

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





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**76-2066**

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 76-2066**

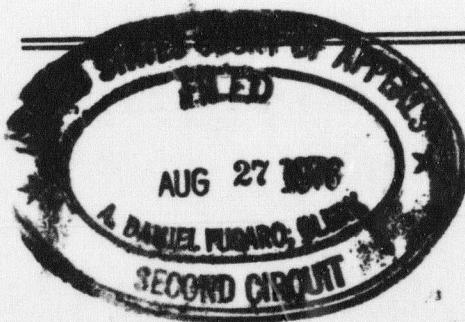
GEORGE HEATH,  
*Petitioner-Appellant,*  
—against—

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**GOVERNMENT'S APPENDIX**

DAVID G. TRAGER,  
*United States Attorney,  
Eastern District of New York.*





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## TABLE OF CONTENTS

	PAGE
District Court Docket Sheet (75 C 956) .....	A-1
District Court Docket Sheet (76 C 516) .....	A-4
Stenographer's Transcript of December 14, 1973 ( <i>United States v. George Heath</i> , 73 Cr. 116) .....	A-6
Stenographer's Transcript of February 25, 1976 ( <i>George Heath v. United States</i> , 75 C 956 and 75 C 2120) .....	A-20
Memorandum and Order of Judge Weinstein, dated March 1, 1976 (75 C 956) .....	A-34
Stenographer's Transcript of May 19, 1976 ( <i>George Heath v. United States</i> , 76 C 516) .....	A-38
Memorandum and Order of Judge Weinstein, dated May 20, 1976 (76 C 516) .....	A-46



DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	S	DEMAND OTHER	JUDGE NUMBER	JURY DEAL	DO YR.
207/1	75 956	5 16 75	3	510	1	REOPEN				0715	WEINSTEIN	
PLAINTIFFS						DEFENDANTS						

UNITED STATES OF AMERICA  
ex rel. GEORGE HEATH

ATTORNEY GENERAL OF THE U.S.

UNITED STATES OF AMERICA  
ex. rel. GEORGE HEATH

ATTORNEY GENERAL OF THE U.S.  
BOARD OF PAROLE,  
BUREAU OF PRISONS,  
DEPT. OF JUSTICE

73 CR 116 RELATES

CAUSE

28:2255  
MOTION TO VACATE JUDGMENT

ATTORNEYS

PLTFF: PRO SE

Box 1000  
Lewisburg, Pa 17837

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DATE	NR.	PROCEEDINGS	A	2
6/16/75		Application pursuant to T-28 U.S.C. Sec. 2255 filed .		(1)
6/16/75		By WEINSTEIN, J.- Memorandum and Order filed that the Clerk shall issue a summons in this case and further that complaint is dismissed (copy of memorandum mailed to plttf and U.S. Atty)		(2)
6/16/75		Summons Issued		(3)
6-17-75		Copy of letter of Clerk of Court filed dated June 17, 1975 addressed to relator herein re enclosure of a copy of memo., etc. cc U.S. Atty. E.D.N.Y., together with all papers in the file.		(4)
8-13-75		Letter of George Heath filed dated Aug. 6, 1975, etc., addressed to WEINSTEIN, J., etc., together with an order enforced thereon by WEINSTEIN, J treating this letter as a NOTICE OF APPEAL. Clerk to notify defendant. SO ORDERED. (See order)		(5)
8-13-75		Above record certified & mailed to U.S.C.A.		(6)
8-28-75		Receipt for record on appeal ret and filed.		(7)
12-19-75		Letter of Paul B. Bergman to Judge Weinstein dtd 12-16-75 filed re: remand of action from C of A.		(8)
12-19-75		By WEINSTEIN, J.--Order dtd 12-16-75 directing the U.S. Atty to respond or move for reconsideration, filed on acc. #6, pg. 2.		(9)
12-24-75		Copy of order mailed to Plttf & U.S. Atty.		(10)
12-24-75		Letter dtd 12-19-75 to J. Weinstein from petitioner filed. (mg)		(11)
12-24-75		All documents received from Clerk, U.S.C.A. - Receipt signed by F. Yurcan, Deputy, and mailed to said Court.		(12)
1-2-76		Letter of petitioner dtd 12-22-75 to Judge Weinstein filed		(13)
1-30-76		Petition for habeas corpus ad testificandum ret 2-11-76 filed. Writ issued.		(14)
2-11-76		Before WEINSTEIN, J. - Case called & hearing adjd to Feb. 20, 1976 at 10:30 A.M.		(15)
2/13/76		Writ ret'd and filed. Executed.		(16)
2-13-76		MOTION FOR NISI ORDER FILED.		(17)
2-23-76		Before WEINSTLIN, J.- Case caccled for hearing and adj to 2-25-76		(18)
2-25-76		Before WEINSTEIN, J.-Case called. plttf present. Defts motion to vacate sentence argued and denied. 75C 956 is dismissed. Oral findings read into record. Govt. to submit order. Govt's motion to transfer venue to the Middle District of Pa. is granted. (75C 2120)		(19)
3-2-76		By WEINSTEIN, J.- Memo and order dtd. 3-1-76 that the petitioner's application seeking releif from his sentence is dsimissed filed. (copies mailed.)		(20)
3-3-76		Judgment that the petitioner take nothing off the respondent and that the petition is dsimissed filed.		(21)
3-16-76		Notice of appeal filed.		(22)
3-17-76		Writ ret and filed/executed.		(23)
3-22-76		Letter dtd. 3-18-76 from George Heath to Clerk filed.		(24)
4-7-76		Entire file certified and handed to Joan Gill to be transmitted. to the C of A.		(25)
4/14/76		Stenographer's transcript of 2/25/76 filed		(26)
5-26-76		Judgment dtd. 5-25-76 that the petitioner take nothing of the respondent and that the motion is under 28 U.S.C. §2255 is dismissed filed.		(27)



## CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF

GEORGE HEATH

DEFENDANT

ATTY GENERAL OF US

A

3

DOCKET NO.

PAGE OF

DATE

NR.

PROCEEDINGS

6-4-76 JS

Certified copy of mandate from C of A denying motion for leave to proceed in forma pauperis and assignment of counsel filed. The cause is remanded to the district court for further consideration in light of US v. Slutsky filed.  
mg



DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	\$	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUMB
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**APPEAL**

**WEINSTEIN**

PLAINTIFFS

DEFENDANTS

HEATH, GEORGE

U.S.A.

GEORGE HEATH

UNITED STATES OF AMERICA

CAUSE

28 USC 2255 - motion to vacate sentence.

Related cases: 75 C 956, 73 CR 116.

ATTORNEYS

For PLNTFF:  
GEORGE HEATH/ pro se 77486-158  
150 Park Row  
New York, New York 10007

FOR PLTFF:  
JAMES BING  
One Chase Manhattan Plaza  
N.Y., N.Y., 10005

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FILING FEES PAID

STATISTICAL CARDS

DATE

RECEIPT NUMBER

C.D. NUMBER

CARD

DATE MAILED

JS-6



76C 516

HEATH

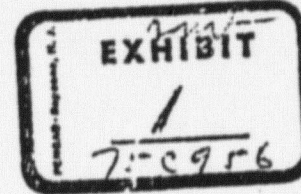
vs

USA

DATE	NR.	PROCEEDINGS	A	5
3-17-76		Petition for Writ of Habeas Corpus with <del>an</del> Motion to vacate sentence affixed. filed.		(1) (c)
3-22-76		By WEINSTEIN, J. - Memo and order dtd. 3-19-76 appointing counsel for petitioner and hearing to be no later than 2 weeks from 3-19-76 filed. Copies sent to petitioner, U.S. Attorney & U.S. Marshall & copy of whole file sent to James Bing as per order.		(2)
3-26-76		Copy of memo and order ret. and filed/ Marshall's note: subject returned to Lewisburg filed.		(3)
3-26-76		Petition for writ of habeas corpus ad testificandum for Heath filed.		(4)
3-26-76		By WEINSTEIN, J. - Writ of habeas corpus ad testificandum for George Heath issued.		(4)
3-29-76		Copy of letter dtd. 3-26-76 from David McMorrow to <del>XXXXX</del> George Heath filed.		(5)
3-31-76		Petition for a writ of habeas corpus with motion to vacate sentence filed		(6)
4-1-76		Copy of letter dtd. 3-29-76 from David McMorrow AUSA to James Bing filed.		(7)
4-29-76		Writ returned and filed/executed <del>XXXXX</del> dtd 5-4-76		(8)
5-6-76		BY WEINSTEIN, J. - Two writs of Habeas Corpus ad testificandum/ issued and filed.		(9)
5-6-76		BY WEINSTEIN, J. - Order to show cause dtd 5-4-76 ret 5-10-76 at 9:30 AM why a writ of Habeas Corpus should not issue and Petitioner be released from custody etc. filed. Annexed petition for a writ of Habeas Corpus.		(1)
5-6-76		Memorandum in support of petition for a writ of Habeas Corpus filed.		(1)
5-10-76		Before WEINSTEIN, J. - Case called . Motion adj'd to 5-17-76.		
5-12-76		Letter dtd. 5-7-76 with motion pursuant to rule 59 from George Heath to Judge Weinstein filed. Copy of motion mailed to petitioner's counsel asp per order of Judge Weinstein filed.		(13)
5-17-76		Before WEINSTEIN, J. - Case called & motion adj'd to 5-19-76.		(14)
5-18-76		Government's memorandum of law filed.		
5-19-76		Before WEINSTEIN, J. - Case called. Petitioner and counsel present. Decision reserved.		(15)
5/21/76		Affidavit of Service filed.		(15)
5-24-76		By WEINSTEIN, J. - Memo and order dtd. 5-20-76 granting a motion for a rehearing in 75-C-956 and upon reconsideration and a further hearing the Court's previous dismissal is adhered to and 76-C-516 is dismissed and a certificate of probable cause is granted in 76-C-516 filed. p/c mailed.		(16)
5-25-76		JUDGMENT dtd 5-25-76 dismissing the petition filed. Certificate of probable cause is granted. p/c		(17)
6-17-76		Notice of appeal filed.		(18)
5-18-76		Sten. transcript dtd. 5-19-76 filed.		(19)
5-22-76		Authorization for expert services filed.		(20/21)



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK



3 -----X  
4 UNITED STATES OF AMERICA :

5 -against- :

6 GEORGE HEATH :

7 Defendant. :

73 CR 116

8 -----X

9  
10  
11 United States Courthouse  
12 Brooklyn, New York

13 December 14, 1973

14  
15  
16 B e f o r e :

17 HONORABLE JACK B. WEINSTEIN, U.S.D.J.  
18  
19  
20  
21  
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23 MICHAEL PICOZZI  
24 OFFICIAL COURT REPORTER  
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Appearances:

ROBERT A. MORSE, ESQ.  
United States Attorney  
for the Eastern District of New York

BY: STEPHAN BEHAR, ESQ.  
Assistant United States Attorney

SIMON CHREIN, ESQ.  
Legal Aid Society  
Attorney for Defendant

- - -



1 MR. CHREIN: If the Court please --

2 THE COURT: Did I sentence this defendant?

3 MR. CHREIN: Yes. I can give you a little bit  
4 of a background on this case.

5 This defendant was tried before Judge Rosling  
6 last year before Judge Rosling passed away. He was  
7 found guilty of Count Two involving 2113(d), armed  
8 bank robbery. In addition, 2113(e). In addition,  
9 a conspiracy to rob another bank and guilty of carrying  
10 a weapon during the commission of a felony.

11 The matter was appealed on the count involving  
12 the armed bank robbery, accompanied by kidnapping and  
13 was reversed and the Government was allowed a period  
14 of time in which to elect whether they wished to re-try  
15 Mr. Heath in connection with the more serious charge  
16 or not. Your Honor's sentence was ten years on all  
17 counts, to run concurrently with the exception of  
18 the conspiracy, which had a maximum of five years.

19 The defendant is now before the Court pursuant  
20 to the mandate of the Court of Appeals. I would like  
21 to be heard briefly.

22 THE COURT: What is the election of the Govern-  
23 ment?

24 MR. BEHAR: The Government has elected not to  
25 re-try the defendant on the first two counts, the bank



A 9<sup>4</sup>

1 robbery of October 12, 1972 -- the minimum sentence  
2 under the (e) count was ten years and the maximum was  
3 life. The minimum sentence now under the possession  
4 count is one year, maximum ten years, and of course  
5 the 371 count is zero to five.

6 At the first sentence your Honor imposed sen-  
7 tence of ten years.

8 MR. CHREIN: May I be heard briefly?

9 THE COURT: I don't have the full material. May  
10 I see the indictment?

11 MR. BEHAR: There are Counts Four and Five  
12 also to the indictment.

13 MR. CHREIN: I have a copy.

14 THE COURT: What is the problem?

15 MR. CHREIN: The appeal was that our office took  
16 the position that Judge Rosling interrupted my cross-  
17 examination extensively and showed partiality to the  
18 Government in questions put to the defendant in the  
19 presence of the jury.

20 The reason, I would assume, that the two final  
21 counts were permitted to stand is the defendant was  
22 apprehended by police officers on the scene.

23 THE COURT: The evidence is overwhelming.

24 MR. CHREIN: On the two final counts. If I  
25 can recapitulate the facts of the case, and Mr. Behar



1 can correct me if I misrepresent or omit anything  
2 material, the defendant was arrested at the scene of  
3 an automobile crash. Apparently, three individuals  
4 had kidnapped a taxicab driver and compelled him to  
5 drive to a bank. The bank was on the point of closing.  
6 This was in January of last year. This year, I'm  
7 sorry. The bank was at the point of closing when the  
8 defendant -- Not this defendant, the individual  
9 driving the automobile, saw a police cruiser. They  
10 decided not to enter the bank and they had driven at  
11 high speed and there was an accident. At the time of  
12 the accident the police officers found an assortment  
13 of weapons in the car as well as the kidnapped driver,  
14 indicating that the defendant and others kidnapped  
15 and compelled him to drive them to the bank.

16 His two companions testified that they had  
17 previously robbed the bank on October of the previous  
18 year and implicated the defendant. The case went to  
19 trial. A motion to sever was denied.

20 I had taken the position that there was less  
21 of a case on the earlier one because it was founded  
22 entirely on the co-defendants. It was denied.

23 The matter was tried and the defendant was found  
24 guilty on the October robbery as well as the January  
25 robbery.



1 Am I correct?

2 MR. BEHAR: Yes, with two exceptions. One --  
3 not actual exceptions -- the Court should know, one,  
4 that the weapons that were found on the defendant  
5 on January 11th included a pipe bomb, several pistols,  
6 a sawed-off shotgun, and they were found in a bag in  
7 the seat of the car. The defendant, along with one  
8 of the Johnson brothers, was located in the back seat.

9 In addition, there was a Halloween mask and  
10 the defendant was wearing two sets of clothing at  
11 that time.

12 The Government's contention at the time Judge  
13 Rosling denied the motion to sever was that the modus  
14 operandi was the same on the earlier date of October  
15 12th, to wit, three men went into the bank, one of  
16 them was masked. The one that the Government contended  
17 was masked was the defendant Heath. They got to the  
18 bank by kidnapping an innocent party and forcing that  
19 party to drive to the bank and go to the bank with  
20 them.

21 On the October 12th occasion Mr. Heath was  
22 wearing two sets of clothes and the same condition  
23 was found on January 11th.

24 For that reason, Judge Rosling did not sever the  
25 two cases. Because of the similarity, the Government



1 would have to prove it had one trial instead of two.

2 The defendant was not identified at the earlier  
3 bank robbery because the third robber was masked --  
4 though the witness testified the third robber generally  
5 answered the physical description of the defendant,  
6 a light-skinned Negro.

7 Both the Johnson brothers testified for the  
8 Government at the trial before Judge Rosling. At the  
9 time that the Johnson brothers were sentenced before  
10 your Honor, your Honor sentenced one of the brothers  
11 to Youthful Offender treatment and the second one was  
12 sentenced to five years imprisonment.

13 MR. CHREIN: Since Mr. Behar's comments, I  
14 realize that the defendant does not stand convicted  
15 of the October 12th transaction. Since Mr. Behar has  
16 commented on the evidence, I should comment that that  
17 might indicate the defendant -- while unquestionably  
18 was present at the latter, was not present on the  
19 earlier occasion.

20 One of the Johnson brothers testified he made  
21 a statement to an agent at Daytop that Mr. Heath was  
22 involved in the second robbery and not in the first.  
23 That was brought to the attention of the court and jury  
24 during the trial.

25 In addition to that, there was evidence that



1 Mr. Heath was known to his companions by a particular  
2 nickname.

3 There was additional evidence from the people  
4 in the bank that the person who's supposed to be  
5 Mr. Heath was addressed by a nickname other than the  
6 one he was known by. The person addressed was the  
7 person behind the teller's cage, identified as  
8 being Mr. Heath by the Johnsons, but both the brothers  
9 denied using the name during the course of the robbery.  
10 It certainly implies some other person was behind the  
11 teller's cage.

12 Mr. Heath throughout our investigation of this  
13 case -- Mr. Heath advanced no evidence during the  
14 course of the trial to indicate he was in no way  
15 involved in the January transaction. He did produce  
16 two alibi witnesses testifying to his alibi for the  
17 October occurrence.

18 Mr. Heath, I feel at this point -- may I just  
19 ask my client one question concerning a waiver of  
20 privilege?

21 (Pause.)

22 MR. CHREIN: Your Honor, Mr. Heath has consis-  
23 tently -- I am now going to repeat a conversation I  
24 had with Mr. Heath in advance of trial that would be  
25 privileged, and Mr. Heath waived the privilege --



1 during the preparation for the trial in conversation  
2 with me and an investigator associated with my office  
3 has repeatedly admitted his participation in the  
4 January transaction but consistently denied his  
5 participation in the October transaction.

6 THE COURT: He has been convicted of the  
7 January transaction.

8 MR. CHREIN: Nonetheless, Mr. Behar has  
9 commented on strong evidence of similarity.

10 THE COURT: I will assume for the purpose of  
11 this sentence he is not guilty of the prior one.

12 MR. CHREIN: I re-examined the Probation Report  
13 this morning and one point that stands out in the  
14 Probation Report I think I should comment on is  
15 Mr. Heath was characterized as the mastermind and  
16 provider of the weapons. But the source is labeled  
17 the two Johnson brothers. They would have an interest  
18 in minimizing their guilt and maximizing the guilt of  
19 Mr. Heath. And their reward would be more probable  
20 as Government witnesses.

21 I do feel any characterization of Mr. Heath as  
22 the ringleader and as the person who put the poor  
23 Johnsons up to this act should be taken with a grain  
24 of salt and on the entire record the Court has sentenced  
25 Mr. Heath to the minimum sentence possible and in view



1 of the fact the more serious charge has been set away,  
2 and in view of the fact from the comments I made,  
3 there would be some possibility another jury might  
4 believe Mr. Heath was not guilty of the other charge,  
5 I ask the Court to proportionally reduce the sentence.

6 THE COURT: Do you want to add anything to  
7 what counsel has said?

8 THE DEFENDANT: No, your Honor.

9 THE COURT: Does the Government have anything  
10 to add?

11 MR. BEHAR: Only this, your Honor, as the  
12 Government mentioned at the time of the Johnson  
13 sentencing, the Government -- as to the events in  
14 question on those dates -- found that the Johnsons  
15 were most consistent as to their stories as to what  
16 happens throughout the time they were questioned by  
17 the Government. There is quite frankly no reason to  
18 believe they were minimizing their own activities.  
19 In fact, one of the Johnson brothers told me that  
20 at least one of the guns was supplied by them. And  
21 this was brought out at trial.

22 As to the other guns, they said they came from  
23 Mr. Heath.

24 The only other thing I wish to point out to the  
25 Court, as is stated in Mr. Heath's Probation Report,



1 his criminal record includes a conviction for man-  
2 slaughter in the State Court. Mr. Chrein mentions  
3 proportionate sentence. I think your Honor sentenced  
4 Mr. Heath on the previous occasion based upon each of  
5 the crimes charged and both the Johnson brothers did  
6 cooperate fully with the Government, and were sentenced  
7 I think somewhat proportionately to Mr. Heath's  
8 sentencing. A severe reduction of sentence, I respect-  
9 fully submit, might be questionable in view of the  
10 sentence imposed on the Johnsons and in view of the  
11 seriousness of the crimes charged on January 11th  
12 where there was a substantial arsenal found in the  
13 car and Mr. Heath admitted participation in the January  
14 11th robbery -- he has consistently admitted so to  
15 Mr. Chrein -- and at the time of the arrest the FBI  
16 Agents approached the three arrested defendants and  
17 asked them what the story was and do they want to  
18 cooperate and at that point the Johnson brothers came  
19 forward.

20 MR. CHREIN: I don't want to take too much of  
21 the Court's time but since your Honor has not heard  
22 the trial, there was a point brought out at trial that  
23 might be relevant to the sentencing, to the extent of  
24 my client masterminding this crime. In your determina-  
25 tion of the severity of the sentence to be imposed on



1 my client, I would say that the Johnson brothers,  
2 in material that was provided to me, indicated that  
3 they met Heath on the morning of the robbery and that  
4 they had discussed the robbery the day before. That  
5 would attack the statement that he was the plotter.

6 I also would like to comment, since Mr. Heath  
7 is alleged to be the mastermind, that the kidnapped  
8 driver was with Mr. Heath throughout a large period  
9 of time, and Mr. Heath was sitting in the back seat,  
10 and he did have available a rear-view mirror, and at  
11 no time did he identify Mr. Heath. And on entering  
12 a gas station, the gas station attendant had an  
13 opportunity to see Mr. Heath unmasked, and there was  
14 no evidence from the gas station attendant.

15 I hate to rehash my summation but these points  
16 are relevant. If he wasn't there on October 12th,  
17 he couldn't have been much of a ringleader.

18 MR. BEHAR: The kidnapped driver did not identify  
19 any of the participants.

20 THE COURT: The Johnson situation is different.  
21 First of all, they did cooperate. And more importantly,  
22 perhaps the records are very slight -- David Johnson  
23 has no record.

24 By contrast, we have this defendant who has a  
25 record starting at 16, attempted burglary at 16;



1 possession of an air pistol at 17; guilty of assault  
2 and robbery -- this was an armed robbery; and then  
3 actually killing a store clerk.

4 The problem for this Court is if he is released  
5 whether he will take up with guns again and kill other  
6 people.

7 MR. CHREIN: Your Honor, I should remark that  
8 the defendant is presently in custody with the State  
9 of New York, after entering a plea of guilty and is  
10 presently serving a 10-year sentence.

11 THE COURT: He is serving a 10-year sentence?

12 MR. CHREIN: With the State of New York. There  
13 is a possible question as to its concurrency. For  
14 that reason, I ask the Court to consider leniency.

15 THE COURT: The problem is whether you will be  
16 killed or other people will be killed.

17 Eight and a half years on Count Four, pursuant  
18 to 4208(a)(2); four years under Count Five, pursuant  
19 to 4203(a)(2). Both concurrent with the other.

20 MR. CHREIN: Thank you, your Honor.

21 THE COURT: The Court takes no position on the  
22 recommendation respecting service in the Federal  
23 sentence in the State Penitentiary, leaving the matter  
24 up to the policies of the Department of Justice in  
25 such cases.



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Anything further?

MR. CHREIN: Nothing, your Honor.

THE COURT: Good luck. I am sorry. I hope when you get out you won't take up with guns again.

MR. CHREIN: I take it that the Court's statement concerning not taking a position concerning concurrency is not recommended or precluded?

THE COURT: Correct.

MR. BEHAR: The Government moves to dismiss as to Two and Three of Indictment 73 CR 116.

THE COURT: Granted.

\* \* \*



1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

A 20

3 -----x  
4 GEORGE HEATH,

5 Plaintiff,

6 -against-

7 UNITED STATES OF AMERICA.  
8 -----x

9  
10 United States Courthouse  
11 Brooklyn, New York

12 February 25, 1976

13  
14 B e f o r e :

15 HONORABLE JACK WEINSTEIN, U.S.D.J.  
16

17 I hereby certify that the foregoing is  
18 a true and accurate transcript from my  
19 stenographic notes in this proceeding.

20 *Perry Auerbach*

21 Official Court Reporter  
22 U. S. District Court

23 PERRY AUERBACH  
24 ACTING OFFICIAL COURT REPORTER  
25

BEST COPY AVAILABLE



## Appearances:

DAVID G. TRAGER, ESQ.  
United States Attorney  
for the Eastern District of New York

BY: HERBERT G. JOHNSON, ESQ.  
-and-  
DAVID W. McMORROW, ESQ.  
Assistant United States Attorney

GEORGE HEATH, Pro se

## Also Present:

MARION SELTZER, ESQ.  
Legal Aid Society

- - -



1 THE COURT: Good morning, C. Heath. Do you  
2 have an attorney? A 22

3 MR. HEATH: No. I am representing myself.

4 THE COURT: Very well, I will hear you.

5 MR. HEATH: Your Honor, I would first like to  
6 move this Court for vacation of the sentence itself,  
7 under the circumstances that have been brought during  
8 the last few months; violation of parole, have not  
9 had a proper parole consideration which the Court has  
10 given me. I move the Court for time served on the  
11 sentence. I served over three years and I was never  
12 given a proper parole hearing. If I would have gotten  
13 the proper parole hearing, I may have not had to serve  
14 the three years on the sentence.

15 One more thing is that I do have a state case  
16 to go to, state time to serve. You had suggested that  
17 the time due, to run concurrent with the state sentence.

18 THE COURT: I don't believe I made that  
19 suggestion.

20 MR. HEATH: You had recommended.

21 THE COURT: I don't believe I did. The Clerk  
22 will mark the record, December 14, 1973, as the Court  
23 Exhibit.

24 THE CLERK: Court Exhibit 1.

25 THE COURT: In any event, as you know, my



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1 recommendation is not binding on anybody, even if I  
2 make a recommendation. I have no power to make a  
3 recommendation.

4 MR. HEATH: I understand that, your Honor. I  
5 make this statement to the extent that you would take  
6 this into consideration, since I do have to go to  
7 the state and serve time.

8 THE COURT: Well, I don't understand why.

9 Did you serve the ten years first in the state?  
10 Weren't you serving the ten years when you were  
11 convicted here?

12 MR. HEATH: No, your Honor. I was sentenced  
13 by the Federal Court first.

14 THE COURT: You served in the Federal first?

15 MR. HEATH: Yes.

16 THE COURT: Is there anything further that you  
17 would like to say?

18 MR. HEATH: No. I don't believe it is necessary.

19 THE COURT: Is there anything that the Government  
20 would like to say?

21 MR. JOHNSON: Your Honor, I am provided with  
22 the minutes prepared for the sentencing on December 14,  
23 1973.

24 THE COURT: Give a copy to the defendant.

25 MR. JOHNSON: I only received two. One which



1 y received, and one which was.

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2 THE COURT: Give him a copy.

3 MR. JOHNSON: I will give him a copy and if I  
4 could make a copy for us.

5 THE COURT: It should be on file.

6 MR. JOHNSON: It seems clear in your sentence,  
7 eight and a half years on one count, four years on  
8 the other count, but that you made no recommendation  
9 whatsoever with reference to the concurrent statement,  
10 your Honor, and since 120 days, the application is not  
11 filed, I will not comment on the parole hearings,  
12 since that is really the subject of the separate  
13 pleading Mr. McMorrow is handling. But, the remand  
14 by the Second Circuit as we indicated in our letter  
15 to your Honor, are that as to why the Second Circuit  
16 would be remanded with respect to the Slutzky decision,  
17 because it was a case decided upon a Rule 35 motion,  
18 applicable in this case at any time served, is correct.

19 THE COURT: This Court does not understand why  
20 the Second Circuit remanded in the light of the United  
21 States vs. Slutzky, 514 Fed. 2d, page 222.

22 It is very clear that at the time your sentence  
23 was imposed on December 14, 1973, every Judge of this  
24 court was aware of the fact the sentence, under Section  
25 4208(a)(2) would not result in an earlier parole of



1 the defendant. This Court has a sentencing panel.

2 Every judge on all of the panels have discussed this  
3 matter thoroughly, and they were aware of this fact  
4 years before the sentence was imposed in 1973.

5 The attorney representing the defendant George  
6 Heath on December 14, 1973, was Simon Chrein of the  
7 Legal Aid Society, and is one of the ablest attorneys  
8 practicing before this bench. He was fully familiar  
9 with the practice of the Parole Board, and he and this  
10 Court have discussed it on many occasions. In many  
11 instances the Court told the defendant that a 4208(a)(2)  
12 sentence would not result in any earlier parole.

13 It was not necessary to make that statement in  
14 this case, because Mr. Chrein was fully familiar with  
15 the situation. 4208(a)(2) sentence was imposed in  
16 order to give the Parole Board and the corrections  
17 authority maximum freedom to work out a cooperative  
18 sentence with the state, and the authorities, if they  
19 thought fit to do so.

20 This Court believes that it is desirable to  
21 have the state and federal authorities cooperate in  
22 these matters. Their cooperation has not been carried  
23 forward sufficiently. This Court alone cannot do  
24 anything about it. In view of the fact that we have  
25 had an eminent panel of the Second Circuit, this case



1 was referred back to this court, and the Court cannot  
2 believe that the Second Circuit was motivated, either  
3 by carelessness or by cruelty to this defendant in  
4 inducing him to believe that the Court could take  
5 action. If the Second Circuit had something in mind  
6 other than what I infer from its remand, I believe  
7 it should say so in language which is not so cryptic.

8 The Second Circuit is fully aware of the fact  
9 neither this Court nor that Court has its powers in  
10 hands by the fact that the Parole Board of the United  
11 States may be acting in an unsound manner, and I made  
12 this point on a number of occasions, and particularly  
13 in D'Alessandro vs. United States, 517 F. 2d 4229,  
14 page 435. The Court in Friendly has also properly  
15 made the point that the venue and jurisdictional  
16 statutes should not be abused in order to bring these  
17 cases attacking the activity of the Parole Board in  
18 another district in this Court. Most recently, he  
19 did it in Kahanae vs. Carlson, slip sheet, November 26,  
20 1975, beginning at 715, and his opinion begins at  
21 page 723.

22 I believe that any Judge who has sat on a  
23 District Court, in reading the record of December 14,  
24 1973, understands that these matters were fully  
25 considered by the Court, by eminent counsel, and that



1 there was nothing further that could be done in the  
2 case. However, if the Court is incorrect in this  
3 respect, it would be pleased to be advised by the  
4 Second Circuit so that the District Court could follow  
5 the wishes of the Second Circuit, whatever they may  
6 be.

7 The Court finds the remand in its cryptic form  
8 must be dealt with as it is now dealing with that  
9 remand by reaffirming the sentence and denying the  
10 motion to set it aside. In this case, which I take  
11 it to be 73 CR 116 --

12 MR. JOHNSON: Also 75 C 956, I think.

13 THE COURT: Also 75 C 756, motion in 73 CR 116  
14 is denied, and the case in 75 C 956 is dismissed.

15 Are there any further findings that you wish,  
16 Mr. Heath?

17 MR. HEATH: Yes. I would like to bring to your  
18 Honor's attention that according to the Slutsky and  
19 Billiteri case.

20 THE COURT: Which case?

21 MR. HEATH: Billiteri.

22 THE COURT: How do you spell it?

23 MR. JOHNSON: I have a copy of it, your Honor.

24 (Submitting.)

25 THE COURT: That is B-i-l-l-i-t-e-r-i, 400



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1 F. Supp. 402, Western District of New York?

2 MR. HEATH: Yes. And these particular cases,  
3 defendants that were sentenced with A2 numbers are  
4 now subjected to parole consideration as of the new  
5 guidelines system that the Parole Board has initiated.  
6 This guidelines system was not in effect when the  
7 sentences were given. Therefore, the Parole Board  
8 has determined that a prisoner serving sentences  
9 with A2 numbers must serve, as in my case, was informed  
10 to serve a matter of 44 through 55 months before I  
11 could be eligible for parole. This is well over the  
12 one-third point of sentence. This makes the A2 number  
13 in worse condition than prisoners sentenced under a  
14 more favorable sentence of 402.

15 Since this guideline was not in effect, it would  
16 mean this would be ex post facto.

17 THE COURT: I disagree with you. This Court  
18 was fully aware of the fact when it sentenced you  
19 on December 14, 1973, that the policy of the Parole  
20 Board as it has been for some years not to give in  
21 fact the A2 sentence in a case such as yours. To some  
22 instances, the A2 sentence results in a longer term,  
23 but not for the reasons that you state. Some instances  
24 it results in a longer term because the prisoner is  
25 heard immediately after he is brought to the correctional



1 institution, and then he is set off beyond the one-  
2 third date, so that he doesn't have the advantage  
3 of showing his fine record in the institution. Whereas  
4 if he gets an ordinary sentence, he is brought in  
5 after he has served one-third, and he can rely upon  
6 his fine record.

7 So, it is theoretically impossible, and in a  
8 few cases it may have occurred that a person with  
9 A2 sentence may have stayed in longer than if he had  
10 a straight sentence.

11 There is a matter that Mr. Chrein and all the  
12 authorities in this Court were aware of, and I was  
13 aware of when I sentenced you. The facts however do  
14 not show you have spent a longer term in prison because  
15 of the A2 sentence. You will serve the same time in  
16 A2 as you would under a normal sentence.

17 Now we have another action.

18 MR. JOHNSON: Yes, your Honor. That completes  
19 the matter with respect to the remand. Mr. McMorrow  
20 handled the matter in 75 C 2120, which is the action  
21 with respect to the decision of the Parole Board.

22 MR. McMORROW: On December 9th Mr. Heath wrote  
23 a letter to you, pro se. He noted in this letter that  
24 he was raising new matters, but at the same time said  
25 the same thing had been the crux of the three prior



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1 proceedings. His complaint, pro se complaint, is  
2 somewhat confusing.

3 THE COURT: Excuse me. Mr. Heath, are you  
4 raising now in this case matters that you didn't  
5 raise previously? This was in the Middle District  
6 of Pennsylvania. You had two cases in the Middle  
7 District of Pennsylvania.

8 MR. HEATH: Yes.

9 THE COURT: Both of those cases were dismissed.

10 MR. HEATH: Yes.

11 THE COURT: Now, you are claiming there was  
12 a new matter that wasn't previously before it; is  
13 that right?

14 MR. HEATH: Yes, your Honor.

15 THE COURT: Since it is not clear to me exactly  
16 what it is that you now claim that you didn't claim  
17 before, since the witnesses, including yourself, are  
18 available in the Middle District of Pennsylvania, for  
19 the interest of justice it would seem desirable for me  
20 to have the case handled by the Middle District of  
21 Pennsylvania.

22 There is a bout under the Second Circuit cases  
23 as to whether the defendant is properly in this district  
24 and whether I have jurisdiction, in any event. But,  
25 even if I do have proper jurisdiction and venue, it



1 is proper under all the circumstances and perfectly  
2 clear this should be handled by the Middle District  
3 of Pennsylvania, and therefore I am granting, if the  
4 Government would make such a motion, a motion to  
5 transfer venue to the Middle District of Pennsylvania.  
6

7 MR. McMORROW: The Government makes such a  
8 motion now.

9 THE COURT: Submit the order. I am sending  
10 this back to the Middle District of Pennsylvania to  
11 decide. They will be better able to tell whether this  
12 is something new or something they have decided. If  
13 you want to appeal, you understand now you can proceed  
14 in the Second Circuit.

15 MR. HEATH: Yes, your Honor.

16 THE COURT: I don't tell you whether any of  
17 this is appealable or not. I am not making that  
18 decision. But, I take it you understand how you will  
19 proceed. Do you want any help from a lawyer?

20 MR. HEATH: I would request that Mr. Simon  
21 Chreir do.

22 THE COURT: All right. I see that the repre-  
23 sentative of Legal Aid, Miss Seltzer, is in the court-  
24 room.

25 Miss Seltzer, would you inform your office or  
would you, yourself, discuss with Mr. Heath and try to



1 assist him to the extent that you can?

2 MS. SELTZER: Yes, your Honor. If this is an  
3 appeal that would be taken in the Second Circuit,  
4 I would assume that our Appeals Bureau would handle  
5 it, but I will take down the information.

6 THE COURT: See what you can do to assist  
7 Mr. Heath. He is a very capable young man, but he  
8 is now in the area of jurisdictional venue which has  
9 confused the District judges of this Court. So,  
10 whatever help he can get, I think you ought to avail  
11 yourself of.

12 MR. HEATH: I would like to make one more  
13 statement:

14 Some of these cases are coming before the  
15 Courts concerning the parole system. This has to do  
16 with violation to Parole Board. Second Circuit has  
17 its knowledge that Parole Board has abused its dis-  
18 cretion in a number of cases. So, by abusing this  
19 discretion, what it actually does is that it infringes  
20 on a number of sentencing cases of a defendant.

21 THE COURT: In this case, I don't believe it  
22 has infringed upon my discretion. I gave you eight  
23 and a half years, in view of your record. Your record  
24 showed an extremely dangerous person. Weapons were  
25 used and you had a very bad record. Under the



circumstances, I can't say that the parole board  
misconstrued its duties in keeping you in jail as  
long as it did. I don't believe that this is a valid  
case of abuse, and even if this was a case where I  
had the power, if I had discretion I would not exer-  
cise it. This is not a case such as described in  
D'Alessandro, 517 F. 2d, page 435, where the judge  
had any "resentment over the action of the Parole  
Board." There is no such matter here.

Thank you very much, Mr. Heath. I must say,  
I must in a sense apologize to you for having brought  
you here and had your hopes raised, as I assume they  
were by this remand, and if it appears that the  
Second Circuit feels that I haven't understood the  
remand, if they will make it clear exactly what it  
is they want me to do, I will be very happy to assist  
you in any way I can.

I have no animosity towards you. I would like  
to see you treated as fairly as possible.

Thank you very much.

MR. JOHNSON: Thank you, your Honor.

\* \* \*



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

GEORGE HEATH,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

----- X

A P P E A R A N C E S:

George Heath, Petitioner, Pro Se

DAVID G. TRAGER  
United States Attorney  
Eastern District of New York

By: Herbert G. Johnson  
Assistant U. S. Attorney  
for Respondent

WEINSTEIN, D.J.



Upon remand of this matter to this court from the United States Court of Appeals for the Second Circuit for further consideration in the light of United States v. Slutsky, 514 F.2d 1222 (1975), a hearing was held. Petitioner appeared pro se.

On December 14, 1973, the petitioner had been resentedenced to a term of 8-1/2 years on Count 4 and 4 years on Count 5 of the indictment in 73-CR-116, both terms concurrent with each other. Sentence was imposed pursuant to Title 18, United States Code, Section 4208(a)(2). The court at that time took no position and made no recommendation as to whether such sentence should be served concurrently with a state sentence. A copy of the transcript of the resentencing proceedings was made part of the record of the February 25 hearing.

This court remains in doubt about the basis for the remand by the Court of Appeals in this case. It has earnestly attempted to explore fully with petitioner and with respondent all possible theories and all facts which might aid petitioner, but has found no basis for taking any further action in the case.

The remand is apparently predicated upon United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975). The application of the Slutsky case, which--unlike the case before us--arose



under a timely motion made pursuant to Rule 35 of the Federal Rules of Criminal Procedure, is not clear. Nevertheless, this court has reviewed the transcript and all of the other relevant materials in the case and has heard the petitioner's argument about the question raised as to the intention of this court at the time of sentencing. This court was aware of the procedures and guidelines of the Board of Parole at the time of resentencing. It intended that the Board in its discretion make the determination of the time of release of the petitioner as contemplated under 18 U.S.C. § 4208(a)(2). This court then realized that such release might in fact occur later than would have been the case had the sentence been imposed pursuant to 18 U.S.C. § 4202; it was aware that release would almost certainly not occur earlier because of the § 4208(a)(2) sentence.

In any event, this court, in viewing the actions taken to date by the Board of Parole, finds no reason to believe that the petitioner has been unfairly treated in light of his past record and the seriousness and circumstances of the crime for which he was convicted. The actions of the Board are within what were "the reasonable expectations" of the court at the time of the resentencing on December 14, 1973. See United States v. Slutsky, supra, 514 F.2d at 1229.

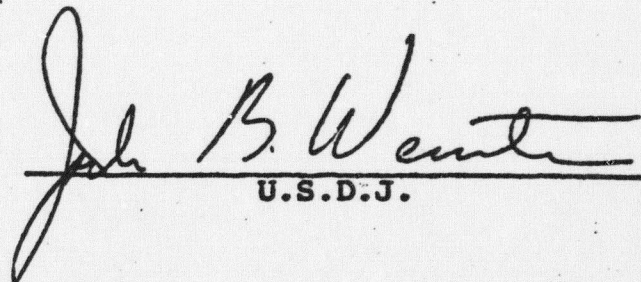


Accordingly, the petitioner's application pursuant to 28 U.S.C. § 2255 seeking relief from the sentence is dismissed.

A copy of this Memorandum and Order shall be mailed by the Clerk of the Court to the petitioner and to the United States Attorney for this district.

So ordered.

Dated: Brooklyn, New York  
March 1, 1976

  
U.S.D.J.



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

GEORGE HEATH, :

Petitioner, :

-against- : 76-C-516

UNITED STATES OF AMERICA, :

Respondent. :

-----x

United States Courthouse  
Brooklyn, New York

May 19, 1976  
10:50 o'clock a.m.

B e f o r e :

HONORABLE JACK B. WEINSTEIN,

U.S.D.J.

GENE RUDOLPH  
OFFICIAL COURT REPORTER



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**A p p e a r a n c e s :**

**JAMES BING, ESQ.**  
**Attorney for Petitioner**

**DAVID G. TRAGER**  
**United States Attorney**  
**Eastern District of New York**

**BY: HERBERT JOHNSON**  
**Assistant United States Attorney**

\* \* \*



1 THE CLERK: George Heath.

2 MR. BING: Your Honor, would it be possible for  
3 George's mother to see him?

4 THE COURT: Yes. I will be happy to -- have her  
5 come forward, please.

6 Yes? Good morning.

7 MRS. DUDLEY: Good morning, sir.

8 THE COURT: Could you give your name and address,  
9 please?

10 MRS. DUDLEY: My name is Marion Dudley, 329  
11 Pachon Avenue.

12 THE COURT: And your relationship to the petitioner  
13 herein?

14 MRS. DUDLEY: His mother.

15 THE COURT: All right. I will hear you.

16 MR. BING: Your Honor, petitioner feels that at  
17 the time of his resentencing, on December 14, 1973,  
18 that the court was not fully aware of the impact or, I  
19 should say, the meaning of the Parole Board Guidelines,  
20 which had just been published about two weeks before the  
21 time of resentencing.

22 I know that your Honor has passed on the question  
23 before, but the petitioner nevertheless would like to  
24 have you rethink the question of whether or not the court  
25 was aware.



1           Upon a reading of the Parole Board Guidelines,  
2           one could be led to think that there would be other  
3           factors which might weigh as heavily as those in the  
4           guidelines with respect to when an inmate would be  
5           eligible for parole.

6           You've seen my memorandum of law covering that  
7           point?

8           THE COURT: Yes. It is very, very thorough.

9           MR. BING: The petitioner feels that the impact of  
10          the guidelines has been to extend the - - the period of  
11          time for which he'd have to stay - - be incarcerated.  
12          In fact, he takes the position that he might have been  
13          better off with the earlier sentence. Of course, that's  
14          petitioner's position.

15          So basically we are saying that the parole term  
16          was unclear.

17          THE COURT: All right. Do you want to add anything  
18          now that you have counsel and you have your mother here,  
19          sir?

20          THE PETITIONER: No, your Honor. Just I will  
21          mention that as I think I may have previously, I believe  
22          that that might be something I submitted.

23          THE COURT: We have this before us but we will  
24          mark it as an exhibit at this hearing. Mark it, please.

25          THE CLERK: Plaintiff's Exhibit 1.



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THE COURT: That is your statement?

THE PETITIONER: Yes. I believe the court might be familiar with the arguments therein.

THE COURT: I am.

THE PETITIONER: All right.

THE COURT: Do you want to add anything, madam?

MRS. DUDLEY: I feel that if any leniency was taken towards George, he would be able to contribute a great deal to society because of his beautiful art work. I'd like to help him in establishing this.

THE COURT: Does the government have anything besides what we have already in the papers?

MR. JOHNSON: No, your Honor.

The government has indicated in response to the arguments made in the briefs by counsel and - - that you have passed previously on the Slutzky question, whatever the Second Circuit had in mind on its remand, and to the extent that there is an additional argument essentially made that the guidelines themselves may have misled the court, we have spoken of that in our brief, and that in fact the (a)2 sentence is not necessarily aimed at providing a shorter period of incarceration and an earlier parole but rather explicitly that would be within the discretion of the Board and may in fact be as your Honor indicated, he was aware a longer term of



1 incarceration inasmuch as the Board - - the court may  
2 not at the time of sentencing fully felt that it could  
3 do enough that it might make a fixed period of time for  
4 parole consideration but rather leave to the Board of  
5 Parole to do so.

6 If I could just comment briefly to the question  
7 of indefiniteness, which is a second argument raised by  
8 the petitioner, that the guidelines themselves create  
9 indefiniteness which constitutes an illegal sentence.  
10 We've cited Grasso versus Norton, the decision of the  
11 Second Circuit, the Court of Appeals, which passed upon  
12 essentially the validity of the guidelines as in our  
13 view determined that question.

14 However, the guidelines somewhat perhaps ironically,  
15 the claim made of indefiniteness inasmuch as the guide-  
16 lines were made to promote greater conformity and also  
17 made the Parole Board procedures more rational and more  
18 predictable. In fact, it is an attempt to produce  
19 greater consistency and predictability on the part of  
20 both prisoners and the court in seeing that is done.

21 MR. BING: Basically, your Honor, it's the policy  
22 statement which causes the problem, whether or not the  
23 parole term is indefinite.

24 THE COURT: In going through the record of the  
25 hearing of February 25, I notice that a number of my



1 remarks were garbled. The general sense is clear. In  
2 some grammatical ways they do not appear quite as I said  
3 them. These things, undoubtedly, because I was talking  
4 too quickly and too low, not because of any error on the  
5 part of the reporters.

6 All right. I have thoroughly considered the  
7 matter and I will reserve decision on it. I will issue  
8 a memorandum.

9 Thank you very much.

10 MR. BING: Thank you, your Honor.

11 THE COURT: The defendant may be returned from  
12 whence he came.

13 MR. JOHNSON: To Lewisburg from MCC?

14 THE COURT: Yes.

15 Thank you very much.

16 MR. BING: Could he have a few minutes with his  
17 mother?

18 THE COURT: Yes. Permit a visit, please.

19 THE MARSHAL: Yes, sir.

20 MR. BING: Thank you, your Honor.

21  
22 \* \* \*  
23  
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EXHIBITS

PLAINTIFF'S

PAGE

1 Statement

4

- 1
- 2
- 3
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- 5
- 6
- 7
- 8
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- 10
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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GEORGE HEATH,

Petitioner,

76 C 516

- against -

UNITED STATES OF AMERICA,

MEMORANDUM  
and  
ORDER

Respondent.

- - - - -x

Appearances:

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by HERBERT G. JOHNSON  
Assistant United States Attorney



WEINSTEIN, D. J.

A brief recapitulation of petitioner's imaginative and tenacious attempts to have his term of imprisonment reduced may be partially summarized by reference to the various cases in which he has been a party in this court.

73 CR 116

This indictment had four counts:

Count I - robbery by force and violence or intimidation at the Chase Bank on October 12, 1973;

Count II - assaulting and placing in jeopardy the lives of Chase Bank employees by the use of a dangerous weapon;

Count III - forcing a person to accompany defendants in the course of a robbery against that person's will;



Count IV - conspiracy to commit bank robbery at the United National Bank on November 11, 1973; and

Count V - use of firearms to commit the offense of conspiracy to commit the National Bank robbery on November 11, 1973.

There was a jury verdict before Judge Rosling of guilty on Counts II, III, IV and V, and innocent on Count I on March 6, 1973. Because of the untimely death of Judge Rosling, the defendant was sentenced by another judge of this court to four concurrent sentences of 10 years, each pursuant to 18 U.S.C. § 4208(a)(2), on May 25, 1973.

On October 17, 1973 the Second Circuit Court of Appeals reversed on Counts II and III. On December 14, 1973, on remand, there were imposed two concurrent sentences of 8 1/2 years on Count IV and 4 years on Count V pursuant to 18 U.S.C. § 4208(a)(2).

A motion to reduce the sentence was filed on December 15, 1973. This pro se motion cited petitioner's family situation and remorse. It was denied on December 21, 1973, on the grounds that no evidence not already considered by the court at the time of the original sentence was



presented by the motion.

A motion to reduce sentence, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, was filed on February 25, 1974. In support of the motion, the court was informed that on May 31, 1973 petitioner pled guilty in Supreme Court, Queens County Criminal Term, Part III, to kidnapping in the second degree as a result of events in the above indictment. A state sentence of 10 years was imposed, with the minutes of the sentencing indicating the judge's desire that the state and federal sentences run concurrently. Defendant requested a modification of the sentence to include a recommendation that the federal sentence run concurrently with the state sentence. On March 12, 1974, the sentence was amended to recommend that the sentences be served concurrently in a New York State prison.

74 C 753

A motion to vacate the judgment pursuant to 28 U.S.C. § 2255 was made on May 13, 1975. The grounds were as follows:

- a) the trial judge refused to allow petitioner use of 3500 material for refreshment purposes;



b) the trial judge prejudiciously intruded in the case to rehabilitate government witnesses; and

c) testimony of co-defendants was procured as a result of coercive plea negotiations.

This motion was denied on July 19, 1974 on the grounds that:

a) petitioner was given a copy of the entire file before the first government witness took the stand;

b) no justification exists for a new trial on the basis of material not available when the issue of prejudicial rehabilitation was raised on appeal resulting in the reversals of Counts II and III; and

c) no evidence exists to suggest the presence of any plea negotiations which were not revealed and explored at the trial during the cross-examination.

75 C 956

A motion to vacate the sentence pursuant to 28 U.S.C. § 2255 was made on June 6, 1975. The grounds were as follows:

a) the Parole Board's initial hearing determination was tainted by its mistaken impression that petitioner was serving a 10 year as opposed to an 8 1/2 year sentence; and



b) in sentencing the petitioner under 18 U.S.C. § 4208(a)(2), the judge was not aware of Board policies which in effect place petitioner in no better position for the purposes of early release than persons sentenced under 18 U.S.C. § 4202.

Petitioner had previously brought a habeas corpus petition on November 5, 1974 in the Middle District of Pennsylvania. It was dismissed on the basis of respondent's affirmation that petitioner would receive review at the 1/3rd point of his sentence, August 1976, in keeping with Board policies. Petitioner's motion for reconsideration on the grounds that the 1/3rd point of his sentence is not August of 1976 was denied when it was clarified that that point would be reached on November 12, 1975.

75 C 956 was dismissed in partial reliance on the decision of the District Court of the Middle District of Pennsylvania. Petitioner appealed on August 13, 1975 to the Second Circuit Court of Appeals. The Second Circuit on December 12, 1975 denied a motion for leave to proceed in forma pauperis and for assignment of counsel, and remanded to this court for further consideration in light of



United States v. Slutsky, 514 F.2d 1222 (1975). Its entire unpublished opinion read as follows:

"Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied and the cause remanded to the district court for further consideration in the light of United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975)."

On remand this court held a hearing on February 25, 1976 which required production of petitioner. On March 1, 1976, this court dismissed the complaint on the independent grounds that:

a) the motion for relief pursuant to Slutsky was not filed within 120 days as required by Rule 35 of the Federal Rules of Criminal Procedure; and

b) the actions of the Board of Parole were within the reasonable expectations of the court at the time of sentencing on December 14, 1973.

A notice of appeal was filed by the petitioner on March 9, 1976. This appeal is still pending.



75 C 2120

Petitioner challenged the action of the Board of Parole. This action was transferred to the District Court for the Middle District of Pennsylvania in light of that court's experience with a previous action by petitioner challenging the Board's action.

76 C 516

On March 8, 1976 petitioner filed a "petition for a writ of habeas corpus pursuant to Title 18 U.S.C. 2255." In his pro se petition, he challenged this court's dismissal of his complaint following the Slutsky remand in 75 C 956. Petitioner argues that the sentence imposed by this court on December 14, 1973 was "illegal". He alleges in addition that the hearing held on February 25, 1976 was fatally defective because he was denied the benefit of counsel.

It seems clear that petitioner had waived the right to counsel at the hearing. Nevertheless, on March 19, 1976 this court issued a memorandum and order appointing counsel for petitioner. Counsel served in both 76 C 516 and 75 C 956.



Although the present proceeding has been assigned a new case file number (76 C 516), this latest case might be more appropriately treated as a petition for rehearing in the previous action (75 C 956). Counsel for petitioner has implicitly taken this approach in his memorandum in support of the petition (brief p. 3). The issues argued are those raised or which could have been raised at the February 25 hearing.

There is no basis for further relief. No arguments now advanced by petitioner or his counsel justify a result different from that reached at the previous hearing. No new facts have come to light not previously known. Nor has petitioner shown that the reasonable expectations of this court at the time of sentence were inconsistent with the treatment petitioner has received or probably will receive as a result of the Board guidelines.

The authority upon which petitioner relies is inapposite. In both Putt v. United States, 363 F.2d 369 (5th Cir. 1966), and Parness v. United States, 368 F.2d 327 (3d Cir. 1966), false information had been presented to the court in the pre-sentence reports. Since the sentencing judges found that the false information had not affected their judgment, the sentences



were not changed. Here no false information had been presented to the court regarding petitioner's past record. Moreover, this court has indicated that the Parole guidelines which petitioner characterizes as "misleading" (brief p. 5) were within the reasonable expectation of this court at the time of sentencing.

Petitioner's argument that this court's sentence was so indefinite as to constitute an "illegal sentence" within the meaning of Rule 35 of the Federal Rules of Criminal Procedure because there was no way of knowing when the Board would release him on parole is not persuasive. This court's sentence was not "ambiguous with respect to time and manner in which it is to be served." There is no analogy to Scarponi v. United States, 313 F.2d 950 (10th Cir. 1963). The standard of Benson v. United States, 332 F.2d 288, 291 (5th Cir. 1964), requiring "a . . . sentence . . . plain, unequivocal, and . . . free from doubt" has been met.

The only "ambiguity" to which petitioner points is that "at the time of resentencing, . . . the court could not have known, even within reasonable range, the length of the sentence Petitioner was to serve" (brief p. 9). This court has already found that the Board's policy with respect to the



treatment of 4208(a)(2) sentences was known to the court at the time of sentencing. Footnote 17 of Slutsky was based upon a misapprehension by the Court of Appeals of the facts so far as concerns the judges of the Eastern District of New York, who had repeatedly discussed this practice at their sentencing panels. They were well aware of the Board's general practice of not exercising its early release powers under a 4208(a)(2) sentence.

If this sentence is illegal because the period in prison is fixed after sentence by the Board, then so is every sentence of incarceration. The fixed policies of the Board have increased rather than reduced predictability. 28 C.F.R. § 2.52. Accepting petitioner's position would require the court to reserve for itself some of the powers of parole and post-sentence supervision, a proposition which is an unacceptable violation of Congressional policy establishing the Board. If the Board does not comply with applicable statutes, there is a remedy against appropriate correction authorities; the remedy is not to set aside a legal sentence. See Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975).



Based upon all information now before the court, were the sentence to be imposed now, it would be identical with that now being served by petitioner.

The court's dismissal in 75 C 956 is now pending on appeal. Should there be a further remand the Court of Appeals will undoubtedly furnish more guidance to this court on action, if any, which is required.

76 C 516 is dismissed. So that the Court of Appeals can have the entire matter before it should an appeal be taken in 75 C 956, a certificate of probable cause is hereby granted in 76 C 516.

The motion for rehearing in 75 C 956 is granted. After a further hearing, upon reconsideration, the previous decision is adhered to and 75 C 956 is dismissed.

So ORDERED.

Dated: Brooklyn, New York  
May 20, 1976.

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U. S. D. J.



AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK

} ss

HERBERT G. JOHNSON

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern

District of New York.

That on the 20th day of August 19 76 he served ~~two~~ <sup>two copies</sup> of the within

Government's Appendix

by placing the same in a properly postpaid franked envelope addressed to:

James Bing, Esq.

1 Chase Manhattan Plaza

New York, N. Y. 10005

and deponent further says that he sealed the said envelope and placed the same in the mail chute  
drop for mailing in the United States Court House, <sup>225 Cadman Plaza East</sup> ~~Washington~~, Borough of Brooklyn, County  
of Kings, City of New York.

HERBERT G. JOHNSON

Sworn to before me this

20th day of August 19 76

CAROLYN N. JOHNSON

Notary Public, New York

NOTARY PUBLIC

Qualified in Queens County

Term Expires March 30, 1977